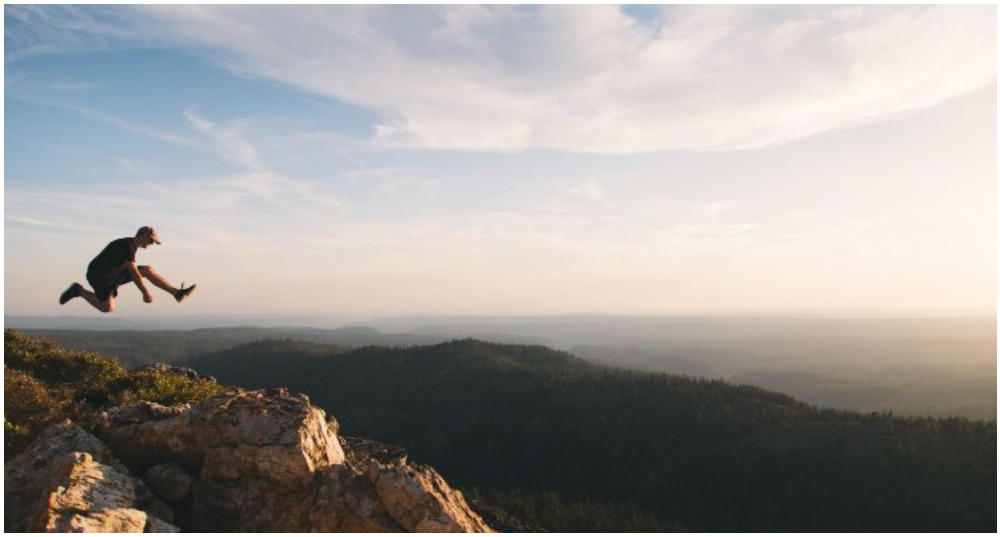

The Pre-Litigation Mediation: Look Before You Leap!

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I have been doing my share of pre-litigation mediations lately, and while just about all of them have resulted in a settlement, it is particularly frustrating when they do not. Why? Because, from my perspective, the main reason they don't settle is that one or more parties didn't come into it ready to settle. So my advice to parties who are considering a pre-litigation mediation is to look before you leap.

Why mediate pre-litigation in the first place? In any legal dispute, the parties usually have control over when they go to mediation. Mediations can take place prior to the litigation, early in the litigation and well into the litigation. The right timing for mediation depends on many factors, and there are pros and cons to mediating at various phases of the case.

One of the pros of a pre-litigation mediation is that the parties can control their litigation costs, particularly where one of the parties is financially distressed. It can also be a good option for parties who are sensitive to the negative publicity of litigation. For some, it is a way to test the other side's allegations and get a sneak preview of the lawsuit.

On the other hand, there are some cons that cannot be avoided. The big one is that there is no formal discovery, so each side has incomplete or untested information. An unexpected witness declaration or document offered at a pre-litigation mediation could result in surprise, which may derail the negotiations.

Understanding and accepting the pros and cons are critical to having a successful pre-litigation mediation. For example, if controlling litigation costs is not a significant driver in your settlement strategy, then mediating prior to litigation may not make much sense.

As mentioned above, pre-litigation mediation may make sense for a party that is financially distressed, but that party needs to come prepared with evidence of its financial condition to back it up if it is looking for a poverty discount. On the flipside, a party that will not be swayed by the other side's financial issues may not get much benefit from a pre-litigation mediation.

Most importantly, the parties need to be prepared to accept some level of uncertainty and surprise. If a party's immediate reaction to new information is to adjourn the mediation and demand formal discovery, then pre-litigation mediation probably is not the best option.

The biggest warning sign of a pre-litigation mediation that is doomed to fail is where the parties do not communicate in advance about their motivations for doing it. The parties' failure to communicate about their expectations in advance also is more likely to result in hard feelings and distrust if the case does not settle, which does not bode well for their working relationship during the litigation.

For these reasons, it is in the parties' best interests to be open and candid about why a pre-litigation mediation makes sense before committing to it. Remember, look before you leap!

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